

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT OF
PUBLIC SAFETY,

Petitioner,

vs.

BRIAN K. HUBBARD,

Respondent.

No. 13-1742 PO

DECISION

Brian K. Hubbard is subject to discipline because he committed a criminal offense involving moral turpitude while on active duty.

Procedure

On October 3, 2013, the Director of the Department of Public Safety (“Director”) filed a complaint, seeking this Commission’s determination that cause exists to discipline Hubbard’s peace officer license. On January 21, 2014, Hubbard filed his answer. On March 27, 2014, the Director filed a motion for summary decision. On April 22, 2014, Hubbard filed his response to the motion.

Regulation 1 CSR 15-3.446(6)¹ provides that we may decide this case without a hearing if the Director establishes facts that Hubbard does not dispute and entitle the Director to a

¹ All references to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

favorable decision.² The Director provided evidence in the form of the original transcript of the underlying criminal trial. This transcript includes the sworn testimonies of Hubbard, the victim, and a third witness to the crime. The Director also provided unauthenticated exhibits of court documents indicating that Hubbard was convicted and that the imposition of sentence was suspended. We decline to use these unauthenticated documents in our decision.³ Hubbard's response to the motion is simply a letter denying the Director's allegations, with no attached affidavit or other admissible evidence.⁴

Findings of Fact

1. Hubbard was licensed as a peace officer at all times relevant to these findings.
2. On December 1, 2004, Hubbard was employed as a peace officer by the police department of the city of Moline Acres, located in St. Louis County, Missouri.
3. At approximately 6:00 p.m. on December 1, 2004, while on active duty as a peace officer, Hubbard intentionally hugged a female correctional officer with one arm while he slid his other hand between her thighs and grabbed her vagina. This occurred in the squad room of the Moline Acres police department.
4. Hubbard's aforementioned actions were committed for the purpose of gratifying his own sexual desire.
5. The female correctional officer did not consent to Hubbard's aforementioned actions.

² *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993).

³ 1 CSR 15-3.446(6)(B).

⁴ *Id.*

Conclusions of Law

We have jurisdiction to hear this complaint.⁵ The Director has the burden of proving Hubbard has committed an act for which the law allows discipline.⁶

The Director argues there is cause for discipline under § 590.080.1,⁷ which states:

The director shall have cause to discipline any peace officer licensee who:

* * *

(2) Has committed any criminal offense, whether or not a criminal charge has been filed;

(3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

Criminal Offense – Subdivision (2)

The Director asserts that Hubbard committed the crime of sexual misconduct in the first degree under § 566.090,⁸ which provided:

1. A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex or he purposely subjects another person to sexual contact without that person's consent.

For purposes of § 566.090, sexual contact is defined by § 566.010⁹ as:

(1) **“Deviate sexual intercourse”**, any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person;

* * *

⁵ Section 621.045, RSMo Supp. 2013.

⁶ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

⁷ RSMo Supp. 2013.

⁸ RSMo Supp. 2002.

⁹ RSMo Supp. 2002.

(3) “**Sexual contact**”, ... any touching of the genitals ... of another person ... or such touching through the clothing, for the purpose of gratifying sexual desire of any person[.]

While the testimony in the trial transcript does not clearly state that Hubbard’s actions were intended to gratify his own sexual desire, we may infer the requisite mental state from Hubbard’s conduct “in light of all surrounding circumstances.”¹⁰ Accordingly, we infer from the entire act – hugging the female officer with one arm, while grabbing her vagina with the other hand – that this was more than an accidental, incidental touching and performed for the purpose of gratifying his own sexual desire. We therefore find that Hubbard’s act constitutes sexual contact, as defined under § 566.010(3). Furthermore, this contact was performed without the consent of the female officer and thus constitutes the crime of sexual misconduct in the first degree under § 566.090.1.

There is cause for discipline under § 590.080.1(2).

Act Involving Moral Turpitude – Subdivision (3)

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”¹¹

In *Brehe v. Missouri Dep’t of Elementary and Secondary Education*,¹² a case that involved discipline of a teacher’s certificate under § 168.071 for committing a crime involving moral turpitude, the court referred to three classifications of crimes:¹³

- (1) crimes that necessarily involve moral turpitude, such as frauds (Category 1 crimes);
- (2) crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (Category 2 crimes); and

¹⁰ *Duncan v. Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs*, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

¹¹ *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).

¹² 213 S.W.3d 720 (Mo. App., W.D. 2007).

¹³ *Id.* at 725 (quoting *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)).

(3) crimes that “may be saturated with moral turpitude,” yet do not involve it necessarily, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (Category 3 crimes).

The court stated that Category 3 crimes require consideration of “the related factual circumstances” of the offense to determine whether moral turpitude is involved.¹⁴

We find that sexual contact with another person – without that person’s consent – would be a Category 1 crime. However, the statute also criminalizes consensual adult sexual intercourse of the same sex. We cannot find that consensual sexual intercourse among adults is a Category 1 crime. This is especially true in light of the United States Supreme Court opinion in *Lawrence v. Texas*.¹⁵ Fortunately, this statute no longer exists. Therefore, we find sexual misconduct in the first degree, limited to the definition under § 566.090, to be a Category 3 crime. We do not make this same finding for the current version of sexual misconduct in the first degree, as defined by § 566.093.¹⁶ The specific facts of this case show that Hubbard committed a crime of moral turpitude when he had sexual contact with a female officer without her consent.

Hubbard was on active duty when he acted. Accordingly, there is cause for discipline under § 590.080.1(3).

Summary

Hubbard is subject to discipline under § 590.080.1(2) and (3). We cancel the hearing.

SO ORDERED on April 23, 2014.

/s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

¹⁴ *Brehe*, 213 S.W.3d at 725.

¹⁵ 539 U.S. 558 (2003).

¹⁶ RSMo. Supp. 2013.